



CoastalPlain_EIS, BLM_AK <blm_ak_coastalplain_eis@blm.gov>

[EXTERNAL] Letters submitted for public comment re: scoping process for Coastal Plain Oil and Gas Leasing EIS

2 messages

Bonner, Rebecca (Energy) <Rebecca_Bonner@energy.senate.gov>

Fri, Jun 15, 2018 at 12:45 PM

To: "blm_ak_coastalplain_EIS@blm.gov" <blm_ak_coastalplain_EIS@blm.gov>

Cc: "Wagner, Mary Louise (Energy)" <MaryLouise_Wagner@energy.senate.gov>, "Fowler, Sam (Energy)" <Sam_Fowler@energy.senate.gov>, "Brooks, David (Energy)" <David_Brooks@energy.senate.gov>

Hello,

Please find attached two letters from U.S. Senators submitted as part of the public scoping process for the Environmental Impact Statement for the Coastal Plain Oil and Gas Leasing Program, Alaska.

Thank you, and please reach out with any questions.

Best regards,

Rebecca Bonner

Professional Staff

U.S. Senate Committee on Energy and Natural Resources

(202) 224-5479

2 attachments**6.15.18 Letter to BLM - Arctic Refuge scoping process (2).pdf**
2269K**6.15.18 Letter to BLM - Arctic Refuge scoping process (1).pdf**
337K**Fowler, Sam (Energy)** <Sam_Fowler@energy.senate.gov>

Fri, Jun 15, 2018 at 12:45 PM

To: "Bonner, Rebecca (Energy)" <Rebecca_Bonner@energy.senate.gov>, "blm_ak_coastalplain_EIS@blm.gov" <blm_ak_coastalplain_EIS@blm.gov>

Cc: "Wagner, Mary Louise (Energy)" <MaryLouise_Wagner@energy.senate.gov>, "Brooks, David (Energy)" <David_Brooks@energy.senate.gov>

Thank you, Rebecca!

From: Bonner, Rebecca (Energy)

Sent: Friday, June 15, 2018 3:45 PM

To: blm_ak_coastalplain_EIS@blm.gov

Cc: Wagner, Mary Louise (Energy); Fowler, Sam (Energy); Brooks, David (Energy)

Subject: Letters submitted for public comment re: scoping process for Coastal Plain Oil and Gas Leasing EIS

[Quoted text hidden]

United States Senate

COMMITTEE ON
ENERGY AND NATURAL RESOURCES

WASHINGTON, DC 20510-6150

WWW.ENERGY.SENATE.GOV

June 15, 2018

Ms. Karen E. Mouritsen
Acting State Director, Alaska
Bureau of Land Management
222 West 7th Avenue, #13
Anchorage, AK 99513-7599

Attention—Coastal Plain EIS

Dear Ms. Mouritsen:

Please consider the comments in the following letter to Secretary Zinke as part of the public scoping process for the Leasing Environmental Impact Statement for the Coastal Plain Oil and Gas Leasing Program, Alaska, and include the letter in the public record of comments received pursuant to the public scoping process.

Thank you.

Sincerely,

A handwritten signature in blue ink, reading "Maria Canfield". The signature is written in a cursive style with a large, stylized initial "M".

United States Senate

WASHINGTON, DC 20510

June 15, 2018

The Honorable Ryan Zinke
Secretary
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240

Dear Mr. Secretary:

We are writing in response to the Department of the Interior's Notice of Intent to Prepare an Environmental Impact Statement for the Coastal Plain Oil and Gas Leasing Program, Alaska (83 Fed. Reg. 17562, April 20, 2018). We ask that this letter be considered as part of the public scoping process for the environmental impact statement.

While we recognize that section 20001 of Public Law 115-97 authorizes the Department of the Interior to undertake an oil and gas program on the Coastal Plain of the Arctic National Wildlife Refuge, we strenuously opposed enactment of section 20001 and believe that oil and gas development on the Coastal Plain is fundamentally incompatible with the purposes for which the Refuge was established. Oil and gas development will do irreparable harm to the Refuge, the fish and wildlife populations the Refuge was established to protect, and the native people who depend on those fish and wildlife populations for subsistence. It is clear that this provision would not have been enacted if it had not been included as part of the budget reconciliation bill, bypassing the normal legislative process.

There has been bipartisan commitment to protect the Coastal Plain of America's most iconic national wildlife refuge for more than half a century, even predating the Eisenhower Administration's establishment of the Arctic National Wildlife Range in 1960 to protect the area's "unique wildlife, wilderness, and recreational values." In 1980 Congress expanded the area and redesignated it as the Arctic National Wildlife Refuge to conserve fish and wildlife populations and habitats in their natural diversity, to fulfill international treaty obligations with respect to fish and wildlife and their habitats, to provide for continued opportunities for subsistence uses by local residents, and to ensure water quality and sufficient water quantity within the Refuge.

In 2015, following a lengthy public process, the United States Fish and Wildlife Service adopted a Comprehensive Conservation Plan for the Refuge that recommended designating the Coastal Plain as wilderness. Over 500,000 public comments were submitted during the planning process and almost all of them supported protecting the Coastal Plain as wilderness.

Given the long history of the efforts to recognize the international importance of the Refuge and to protect its unique wildlife and wilderness values, we are concerned that the Department of the Interior will now seek to expedite the planning and environmental review process for an oil and gas program in the Refuge.

Public Law 115-97 did not waive or supersede any of the environmental laws that apply to the Coastal Plain. Any process to develop and implement an oil and gas leasing program in the Arctic Refuge must fully comply with all applicable environmental laws.

Chief among these laws is the National Wildlife Refuge System Administration Act of 1966. The Coastal Plain remains an integral part of the Arctic National Wildlife Refuge. Section 4 of the Refuge Administration Act requires that the Refuge be administered by the Secretary, acting through the United States Fish and Wildlife Service. In administering the Refuge, the Secretary is still required to provide for the conservation of fish, wildlife, and plants, and their habitats; to ensure that the biological integrity, diversity, and environmental health of the Refuge are maintained for the benefit of present and future generations of Americans; and to permit only uses that are compatible with the major purposes for which the Refuge was established.

Although section 20001(b)(2)(B) added a new purpose to the Refuge, it did not repeal the Refuge's original purposes or relieve the Department of the Interior from its duty to manage the Refuge consistent with those purposes. It did not make the oil and gas program the dominant purpose of the Refuge. The Refuge Administration Act still requires uses of the Refuge to be compatible with the specific purposes for which the Arctic Refuge was established. Any action the Department takes to establish and administer an oil and gas program on the Coastal Plain must be undertaken in a manner that fulfills its continuing statutory obligation to provide for the conservation of fish and wildlife and their habitats and to ensure that the biological integrity, diversity, and environmental health of the Refuge are maintained.

Regardless of the planning process, oil and gas activities on the Coastal Plain—the biological heart of the Refuge—will inevitably adversely impact wildlife and their habitat, including the calving ground of the Porcupine Caribou herd. Disruption of the herd's calving and migration may also cause significant harm to the Gwich'in people who are heavily reliant on caribou as a major food source. Development of the Coastal Plain will also affect the most important onshore denning habitat for polar bears, a federally listed species under the Endangered Species Act.

Decades of drilling on Alaska's North Slope have shown that the negative consequences of industrial development extend far beyond the project footprint. These consequences will be compounded in a region that is affected by climate change more than almost any other area in the United States, with Arctic temperatures rising at twice the rate of the contiguous United States.

While we remain strongly opposed to sacrificing this irreplaceable area to oil and gas development, any actions to implement Public Law 115-97 must be undertaken in full compliance with all environmental laws protecting the Coastal Plain of the Arctic National Wildlife Refuge.

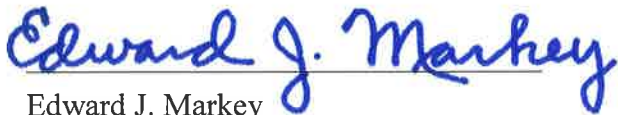
Sincerely,



Maria Cantwell
United States Senator



Charles E. Schumer
United States Senator



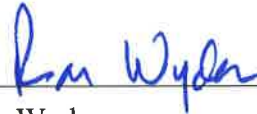
Edward J. Markey
United States Senator



Thomas R. Carper
United States Senator



Tom Udall
United States Senator



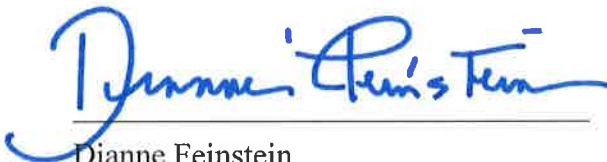
Ron Wyden
United States Senator



Michael F. Bennet
United States Senator



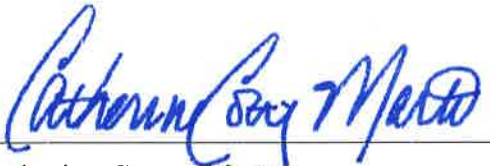
Tammy Duckworth
United States Senator



Dianne Feinstein
United States Senator



Richard Blumenthal
United States Senator



Catherine Cortez Masto
United States Senator



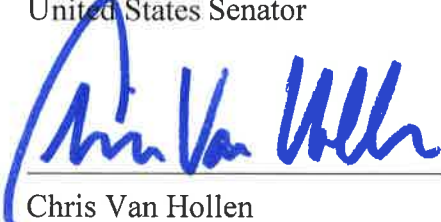
Tina Smith
United States Senator



Sheldon Whitehouse
United States Senator



Jeffrey A. Merkley
United States Senator



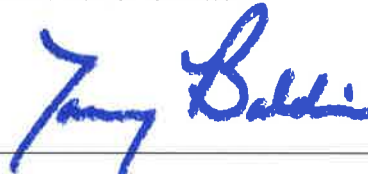
Chris Van Hollen
United States Senator



Margaret Wood Hassan
United States Senator



Richard J. Durbin
United States Senator



Tammy Baldwin
United States Senator



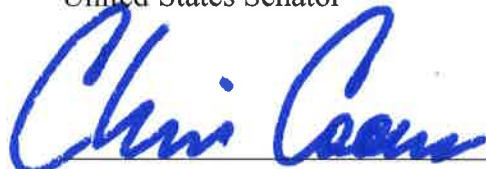
Mazie K. Hirono
United States Senator



Bill Nelson
United States Senator



Jeanne Shaheen
United States Senator



Christopher A. Coons
United States Senator



Debbie Stabenow
United States Senator



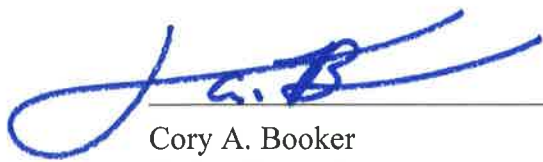
Martin Heinrich
United States Senator



Jack Reed
United States Senator



Kamala D. Harris
United States Senator

A stylized handwritten signature in blue ink, appearing to read 'C.A.B.', with a long horizontal flourish extending to the right.

Cory A. Booker
United States Senator

A handwritten signature in blue ink that reads 'Robert Menendez' in a cursive script, with a horizontal line underneath.

Robert Menendez
United States Senator

A handwritten signature in blue ink that reads 'Bernard Sanders' in a cursive script, with a horizontal line underneath.

Bernard Sanders
United States Senator

A handwritten signature in blue ink that reads 'Gary C. Peters' in a cursive script, with a horizontal line underneath.

Gary C. Peters
United States Senator

United States Senate

COMMITTEE ON
ENERGY AND NATURAL RESOURCES

WASHINGTON, DC 20510-6150

WWW.ENERGY.SENATE.GOV

June 15, 2018

Ms. Karen E. Mouritsen
Acting State Director, Alaska
Bureau of Land Management
222 West 7th Avenue, #13
Anchorage, AK 99513-7599

Attention—Coastal Plain EIS

Dear Ms. Mouritsen:

Please consider the comments in the following letter to Secretary Zinke as part of the public scoping process for the Leasing Environmental Impact Statement for the Coastal Plain Oil and Gas Leasing Program, Alaska, and include the letter in the public record of comments received pursuant to the public scoping process.

Thank you.

Sincerely,

A handwritten signature in blue ink, appearing to read "Maria Canfield", is written below the word "Sincerely,".

United States Senate

WASHINGTON, DC 20510

June 15, 2018

The Honorable Ryan Zinke
Secretary of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Dear Mr. Secretary:

We are writing in response to the Notice of Intent to Prepare an Environmental Impact Statement for the Coastal Plain Oil and Gas Leasing Program, Alaska.¹ We ask that this letter be considered as part of the public scoping process for the environmental impact statement.

We recognize, of course, that section 20001 the Tax Act of 2016, Public Law 115-97, authorizes you to undertake the oil and gas leasing program on the Coastal Plain of the Arctic National Wildlife Refuge. We strenuously opposed enactment of section 20001. We still believe that oil and gas development on the Coastal Plain is incompatible with the purposes for which the Refuge was established in 1980, and that it will do irreparable harm to the Refuge, the fish and wildlife populations the Refuge was established to protect, and the native people who depend upon those populations for subsistence.

We write today to insist that as you move ahead with the oil and gas leasing program under the new law, you do so with close attention to the program's impact on the environment and in strict adherence to applicable environmental laws. Section 20001 does not give you a blank check. Your discretion is constrained by the terms of the Act, the Naval Petroleum Reserve Production Act of 1976 (the "Production Act"),² and a host of other environmental laws. Together, these laws require you to balance the oil and gas leasing activities authorized by section 20001 with your statutory obligations to protect and conserve the important surface resources and environmental values of the Refuge. It is to those obligations that our comments are directed.

¹ 83 Fed. Reg. 17562 (April 20, 2018).

² 42 U.S.C. chapter 78, §§6501-6507.

The Tax Act

We begin with the text of the authorization. Section 20001 of the Tax Act authorizes the Secretary to “establish and administer a competitive oil and gas program for the leasing, development, production, and transportation of oil and gas in and from the Coastal Plain” of the Arctic National Wildlife Refuge. Although the section is brief, it is, in fact, quite prescriptive. It explicitly requires the Secretary, acting through the Bureau of Land Management, to “manage the oil and gas program on the Coastal Plain in a manner similar to the administration of lease sales under the Naval Petroleum Reserve Production Act of 1976 (42 U.S.C. 6501 et seq.) (including regulations).”

Those are not superfluous words.³ They limit the Department’s discretion and must inform and underpin how the oil and gas program is established and administered. They are an integral part of the legislative grant of authority and must be given full effect.⁴

Simply put, your authority to establish and administer an oil and gas leasing program on the Coastal Plain does not allow you to structure the program as you might like. It requires you to administer the new program “in a manner similar to the administration of leases sales under the ... Production Act....”

The Production Act

The Production Act was enacted at a time of “urgent national need for immediate action to produce more domestic oil and natural gas.”⁵ Prior to the enactment of the Production Act, the four naval petroleum reserves were under the jurisdiction of the Secretary of the Navy. They were “subject to the control and use by the United States for naval purposes” alone.⁶

³ Nor are they ambiguous. The phrase “in a manner similar to” is neither a term of art requiring statutory definition nor an empty gap left for you to fill. *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). The phrase uses ordinary words in their ordinary sense. Their meanings are readily found in the dictionary. *See, e.g., FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (in the absence of a statutory definition, courts “construe a statutory term in accordance with its ordinary or natural meaning”). “In a manner” means in a “way of acting.” Webster’s Ninth New Collegiate Dictionary 724 (1986). “Similar to” means “having characteristics in common: strictly comparable”; “alike in substance or essentials.” *Id.* at 1098.

⁴ *See, e.g., Corley v. United States*, 556 U.S. 303, 314 (2009). The “rule against superfluities,” which holds that “[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant...,” is “one of the basic” rules of statutory interpretation. *Id.*, citing *Hibbs v. Winn*, 542 U.S. 88, 101 (2004), and quoting 2A N. Singer, *Statutes and Statutory Construction* § 46.06, at 181-186 (rev. 6th ed. 2000).

⁵ H. Rept. 94-81, part 1, at 4 (1975).

⁶ 41 Stat. 812, 813 (1920) (the Naval Service Appropriations Act for FY 1921).

The Production Act was designed to transfer jurisdiction of the naval petroleum reserves from the Navy to the Department of the Interior so that they could be developed to meet the total energy needs of the nation, not just those of the Navy.⁷ The Production Act renamed the naval petroleum reserves “national petroleum reserves” to reflect their broader national purpose.

The Production Act singled out Naval Petroleum Reserve No. 4, which it renamed “the National Petroleum Reserve-Alaska” (the NPR-A or the Reserve), for special attention. While the Act directed the Secretary of the Interior to prepare plans for the development and production of oil and gas on the three reserves in the lower 48 states, it expressly prohibited “the Secretary from allowing any leasing, development, or production from this Alaskan reserve until further action by Congress.”⁸

The NPR-A required special attention because Congress viewed the lands within the Reserve as having “substantial values” beyond oil and gas. The House committee report on the bill noted that “the western side of the reserve is an historic and current calving ground of the Arctic caribou herd. The northeastern coastal plain is considered to be the best waterfowl nesting area on the North Slope. Finally, lands in and adjacent to the Brooks Range are highly scenic. These areas should all receive consideration in any plans for development.”⁹

Accordingly, the Production Act, as it was originally enacted in 1976, expressly prohibited production of oil and gas from the NPR-A, and it barred any leasing or development leading to production of oil and gas from the Reserve until authorized by a subsequent Act of Congress.¹⁰ It provided instead for what its authors considered “a more sensible and logical approach” to the management of the Reserve.¹¹ It directed the Secretary of the Interior to “assume all responsibilities” for “any activities related to the protection of environmental, fish and wildlife, and historical or scenic values,” and authorized him to adopt “such rules and regulations as he deems necessary and appropriate for the protection of such values within the reserve.”¹²

⁷ H. Rept. 94-81, part 1, at 3-4 (1975).

⁸ *Id.* at 3.

⁹ *Id.* at 8.

¹⁰ Production Act § 104(a), prior to its amendment by section 347(c) of the Energy Policy Act of 2005.

¹¹ H. Rept. 94-81, part 1, at 9.

¹² Production Act § 103(b); 42 U.S.C. § 6503(b).

While the Production Act directed the Secretary to “commence further petroleum exploration of the reserve,”¹³ it expressly required that any exploration of areas “containing any significant subsistence, recreational, fish and wildlife, or historical or scenic value ... be conducted in a manner which will assure the *maximum protection* of such surface values...”¹⁴

The conference committee took great care to ensure that the Secretary understood what it meant by “maximum protection.” The conference committee report emphasized the importance of designating certain areas within the NPR-A “where special precautions may be necessary to control activities which would disrupt the surface values or disturb the associated fish and wildlife habitat values and related subsistence requirements of the Alaska Natives.” While noting that the “maximum protection” requirement was “not a prohibition of exploration-related activities within such areas,” the conferees emphasized that Congress “intended that such exploration operations will be conducted in a manner which will minimize the adverse impact on the environment.”¹⁵

“To this end,” the conferees continued, “the Secretary is expected to take into consideration the needs of resident and migratory wildlife and to schedule exploration activities in a manner which, and at such seasons as, will cause the least adverse influence on fish and wildlife. In scheduling exploration activities in such an area[,] the Secretary should take steps to minimize any adverse effects on native subsistence requirements and associated fish and wildlife values. Specifically, he should conduct exploration activities in these areas during times of the year when the caribou calving season and the nesting and molting seasons of the birds can be avoided.”¹⁶

Moreover, the concern of the conference committee was not confined to certain areas within the NPR-A. The conferees expressly stated that they did “not mean to imply that the Secretary should ignore the environmental ramifications of exploration activities in other areas. On the contrary, it is expected that the Secretary will take every precaution to avoid unnecessary surface damage and to minimize ecological disturbances throughout the reserve.”¹⁷

¹³ Production Act § 104(d); 42 U.S.C. § 6504(d).

¹⁴ Production Act § 104(b) prior to its redesignation as § 104(a) by section 347(c) of the Energy Policy Act of 2005; 42 U.S.C. § 6504(a) (emphasis added).

¹⁵ H. Rept. 94-942 at 21 (1976).

¹⁶ *Id.*

¹⁷ *Id.*

In sum, while the Production Act authorized the Secretary to begin exploration activities within the NPR-A, it did so with the greatest possible care and concern for the subsistence, recreational, fish and wildlife, historical, and scenic values of the Reserve.¹⁸ It ensured maximum protection of these values, notwithstanding “the urgent national need for immediate action to produce more domestic oil and natural gas”¹⁹ the nation faced at the time. By requiring you to “manage the oil and gas program on the Coastal Plain in a manner similar to the administration of lease sales under” the Production Act, section 20001 requires you to proceed with no less care to minimize adverse environmental impacts on the Coastal Plain.

The appropriations rider

Congress ultimately decided to allow oil and gas leasing in the NPR-A through an appropriations rider in December 1980.²⁰ But, in doing so, Congress was still unwilling to sacrifice the surface values of the Reserve, which it had so carefully guarded in the original Production Act, to the new leasing program. The appropriations rider explicitly required that “any exploration or production undertaken pursuant to” the new leasing authority “shall be in accordance with section 104(b) of the” Production Act.²¹ The effect of this provision was to apply the “maximum protection of ... surface values” requirement, which had originally applied only to the federal exploration program, to “any exploration or production” activities undertaken by lessees pursuant to the new leasing authority.

In addition, the appropriations rider authorized the Secretary to prescribe rules and regulations governing oil and gas leasing in the NPR-A to ensure that all activities undertaken pursuant to the leasing program “include or provide for such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the” Reserve.²²

¹⁸ Production Act § 104(a), 43 U.S.C. § 6504(a). *See also* Production Act § 104(c)(2), 43 U.S.C. § 6504(c)(2) (requiring exploration plans to be submitted to Congress); § 105, 43 U.S.C. § 6505 (requiring additional studies of the reserve and the appointment of a task force to study the subsistence, scenic, historical, recreational, fish and wildlife, and wilderness values of the reserve).

¹⁹ H. Rept. 94-81, part 1, 4 (1975).

²⁰ Department of the Interior and Related Agencies Appropriations Act, Fiscal Year 1981, Public Law 96-514, 94 Stat. 2964.

²¹ 94 Stat. 2965, 43 U.S.C. § 6506a(n)(2). Section 104(b) of the Production Act was renumbered as section 104(a) by section 347(c) of the Energy Policy Act of 2005. A conforming amendment was made to section 107(n)(2) of the Production Act by section 347(b)(17) of the Energy Policy Act of 2005.

²² *Id.*, reenacted as section 107 of the Production Act by section 347(b) of the Energy Policy Act of 2005; 42 U.S.C. § 6506a.

Rep. McDade, the Ranking Republican Member on the Interior Appropriations Subcommittee, described the rider as saying “that when the Secretary of the Interior conducts” the leasing program, “he must do so in a manner that treats this petroleum reserve with the greatest possible reverence, with the greatest possible environmental concern....”²³

Administration of lease sales under the Production Act

The manner in which lease sales have been administered under the Production Act is a matter of record. Long before any lease sales in the NPR-A were initiated—or even authorized—the Secretary began by proposing rules “to provide procedures to explore the oil and gas production potential of” the Reserve. These rules were developed “to ensure protection of the environmental and ecological values of the reserve during the required exploration program,”²⁴ as called for by section 103(a) of the Production Act.

The exploration rule was developed with public participation and strict attention to environmental concerns. The public was given 45 days in which to comment on the proposal. Three public meetings were held at three locations in Alaska during the comment period to receive oral comments. An environmental assessment of the proposed action was prepared in accordance with the National Environmental Policy Act.²⁵ Eight months after the rule was proposed, a final rule was adopted.

The final rule expressly required the Department to “mitigate or avoid unnecessary surface damage and to minimize ecological disturbance throughout the reserve to the extent consistent with the requirements of the Act for the exploration of the reserve.”²⁶ In addition, it required “maximum protection measures” to “be taken on all actions within ... special areas ... having significant subsistence, recreational, fish or wildlife, or historical or scenic value.”²⁷ It identified maximum protection measures as including “(1) rescheduling activities and use of alternative routes, (2) types of vehicles and loadings, (3) limiting types of aircraft in combination with minimum flight altitudes and distances from identified places, and special fuel handling procedures.”²⁸

²³ 126 Cong. Rec. H 6780 (daily ed. July 30, 1980) (remarks of Rep. McDade).

²⁴ 41 Fed. Reg. 40484 (Sept. 20, 1976).

²⁵ 42 Fed. Reg. 28720 (June 3, 1977).

²⁶ *Id.* at 28722.

²⁷ *Id.*

²⁸ *Id.*

The final rule also authorized Bureau of Land Management officials to “limit, restrict, or prohibit use of and access to lands within the Reserve ... to protect fish and wildlife breeding, nesting, spawning, lambing [or] calving activity, major migrations of fish and wildlife, and other environmental, scenic, or historic values.” And it expressly prohibited the injury, alternation, destruction, or collection of any “site, structure, object, or other value of historical, archaeological, cultural, or paleontological character, including ... historic and prehistoric remains, fossils, and artifacts” without a valid permit.²⁹

By a separate public notice, the Secretary designated “certain areas containing significant subsistence, recreational, fish and wildlife, or historical or scenic values where special precautions are necessary to control activities which would disrupt such resource values,”³⁰ pursuant to section 104(b) of the Production Act.³¹ The Utukok River Uplands Special Area was designated to protect caribou, the Teshekpuk Lake Special Area, to protect migratory birds, and the Colville River Special Area, to protect the Arctic peregrine falcon in June 1977.³² “All activities ... within these ... special areas” are required to “be conducted in a manner which will assure maximum protection of the resource values to the extent consistent with the requirements of the [Production] Act.”³³

Following the enactment of the appropriations rider authorizing leasing in the NPR-A in 1980, the Solicitor properly concluded that the rider provided “new and independent oil and gas leasing authority” for the NPR-A, and that the Department’s existing leasing regulations adopted pursuant to the Mineral Leasing Act were not applicable to the reserve,³⁴ thus requiring new regulations applicable to the NPR-A.³⁵

²⁹ *Id.*

³⁰ 42 Fed. Reg. 28723 (June 3, 1977).

³¹ Originally section 104(a), but redesignated as section 104(b) by section 347(c) of the Energy Policy Act of 2005; now codified at 43 U.S.C. § 6504(a).

³² 42 Fed. Reg. 28723 (June 3, 1977). Both the Teshekpuk Lake and Colville River Special Areas were further expanded in 1998. 64 Fed. Reg. 16747 (April 6, 1999). A fourth special area, the Kasgaluk Lagoon Special Area was later designated to protect marine mammals in 2004. 70 Fed. Reg. 9096 (Feb. 24, 2005). A fifth, the Peard Bay Special Area was designated to protect marine mammals and migratory birds in 2013. NPR-A Integrated Activity Plan, Record of Decision, 4 (Feb. 21, 2013).

³³ 42 Fed. Reg. at 28723.

³⁴ Moody R. Tidwell, Authorization for Oil and Gas Leasing of the National Petroleum Reserve-Alaska, M-36940, 91 I.D. 1 (Oct. 15, 1981).

³⁵ 46 Fed. Reg. 37725 (July 22, 1981) (proposed rule); 46 Fed. Reg. 55494, 55497 (Nov. 9, 1981) (final rule). The public was given 45 days in which to comment on the proposed rule.

The new leasing regulations were “designed to balance energy development with environmental protections and subsistence values, especially in areas of critical wildlife habitat or subsistence use.”³⁶ As required by the appropriations rider, the leasing regulations require two special stipulations. The first special stipulation, which applies throughout the NPR-A, requires that all activities undertaken under the leasing program be subject to “such conditions, restrictions and prohibitions as the Secretary of the Interior deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the Reserve.”³⁷ The second special stipulation, which applies to the special areas, requires that any exploration or production undertaken under the leasing program be conducted in a manner which will ensure the maximum protection of significant subsistence, recreational, fish and wildlife, or historical or scenic values.³⁸

In sum, the Production Act required the Secretary to establish an oil and gas leasing program in the NPR-A, “while simultaneously assuring that environmental concerns would not be overlooked.”³⁹ It ensured protection of environmental values by requiring “maximum protection” of those values in “areas designated by the Secretary ... containing any significant subsistence, recreational, fish and wildlife, or historical or scenic value,”⁴⁰ and by requiring the Secretary to provide the rules and regulations needed to protect environmental values and mitigate adverse impacts on those values both within specially designated areas and within the NPR-A generally.⁴¹ By requiring you to “manage the oil and gas program on the Coastal Plain in a manner similar to the administration of lease sales under the ... Production Act,” section 20001 of the Tax Act requires you to do no less on the Coastal Plain.

Other environmental laws

A wide range of other environmental laws apply to the oil and gas leasing program. In authorizing an oil and gas leasing program on the Coastal Plain, the Tax Act did not waive or supersede any of those other laws. They continue to apply according to their terms and they must be taken into account and complied with in developing and implementing the leasing program.

³⁶ 46 Fed. Reg. 37725 (July 22, 1981) (proposed rule).

³⁷ *Id.*; codified at 43 C.F.R. § 3131.3.

³⁸ *Id.*

³⁹ *Northern Alaska Environmental Center v. Norton*, 361 F. Supp. 2d 1069, 1072 (D. Alaska 2005).

⁴⁰ *Id.*, citing 42 U.S.C. C.F.R. § 6504(a).

⁴¹ 42 U.S.C. §§ 6503(b), 6504(a), 6506a(b), 6506a(n)(2).

Chief among them is the National Wildlife Refuge System Administration Act of 1966. The Coastal Plain remains an integral part of the Arctic National Wildlife Refuge. The Tax Act does not change that. It authorizes the Bureau of Land Management to manage the oil and gas program on the Coastal Plain, but it does not transfer administrative jurisdiction over the Refuge from the Fish and Wildlife Service to the Bureau. Section 4 of the Refuge Administration Act still requires the Refuge to “be administered by the Secretary through the United States Fish and Wildlife Service.”⁴² In administering the Refuge, you are still required to “provide for the conservation of fish, wildlife, and plants, and their habitats,” to “ensure that the biological integrity, diversity, and environmental health of the ... [Refuge] are maintained for the benefit of present and future generations of Americans,” and to permit only uses that are “compatible with the major purposes” for which the Refuge was established.⁴³

In other words, section 20001(b)(2)(B) added a new purpose—“to provide an oil and gas program on the Coastal Plain”—to the original purposes for which the Arctic National Wildlife Refuge was established,⁴⁴ but it did not repeal the Refuge’s original purposes or relieve you of your duty to manage the Refuge consistent with those purposes.⁴⁵ Nor did it make the oil and gas program the paramount purpose of the Refuge. The Refuge Administration Act still requires that uses of the Refuge must be “compatible with the major purposes” for which the Arctic Refuge was established—not just the newest purpose, but the major purposes for which it was established in 1980. Thus, any action you take to establish and administer an oil and gas program for the leasing, development, production, and transportation of oil and gas on the Coastal Plain under the Tax Act, must be undertaken in a manner that fulfills your continuing statutory obligation to provide for the conservation of fish and wildlife and their habitats and to ensure that the biological integrity, diversity, and environmental health of the Refuge are maintained.

⁴² 16 U.S.C. § 668dd(a)(1). “The statutory language of the Refuge Act shows that the National Wildlife Refuge System must be administered by the Secretary of Interior through FWS.” *Trustees for Alaska v. Watt*, 524 F. Supp. 1303, 1308 (D. Alaska 1981).

⁴³ 16 U.S.C. §§ 668dd(a)(4)(A) and (B), 668dd(d)(1)(A). “[I]n administering the Arctic National Wildlife Refuge, FWS is required to control and direct the Refuge ... in order to conserve the entire spectrum of wildlife found in the Refuge.” *Trustees for Alaska v. Watt*, 524 F. Supp. at 1309.

⁴⁴ The original purposes are: “(i) “to conserve fish and wildlife populations and habitats in their natural diversity...; (ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats; (iii) to provide ... the opportunity for continued subsistence uses by local residents; and (iv) to ensure ... water quality and necessary water quantity within the refuge.” Alaska National Interest Lands Conservation Act, Public Law 96-487, § 303(2)(B), 94 Stat. 2390 (1980).

⁴⁵ See, e.g., *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (“repeals by implication are not favored”). “We must read the statutes to give effect to each....” *Id.*

The Tax Act, the Production Act, and the Refuge Administration Act are only a few of the federal environmental laws that will govern oil and gas activities on the Coastal Plain. The Department's Final Integrated Activity Plan/Environmental Impact Statement on the National Petroleum Reserve-Alaska (the NPR-A EIS) contains a discussion of many of these laws, which need not be repeated here.⁴⁶ Suffice it to say, the Tax Act does not waive any federal law (other than the oil and gas production prohibition in section 1003 of the Alaska National Interest Lands Conservation Act), and the full range of existing environmental statutes and regulations must be taken into account and enforced as the oil and gas leasing program for the Coastal Plain is established and administered.

The scoping process

We turn now to the scoping process itself. Scoping is required by the Council on Environmental Quality's regulations implementing the National Environmental Policy Act (hereinafter NEPA).⁴⁷ As the Notice of Intent acknowledges, the purpose of scoping is to determine the scope of issues to be addressed in the environmental impact statement and to identify the significant issues related to the oil and gas leasing program on the Coastal Plain. Scoping helps define the proposed action and alternatives to the proposed action, and thus helps shape the content of the environmental impact statement.⁴⁸ The scope of the environmental impact statement is determined by the scope of the proposed actions, the significant environmental impacts of those actions, and the reasonable alternatives to the actions.⁴⁹

⁴⁶ Bureau of Land Management, National Petroleum Reserve-Alaska, Final Integrated Activity Plan/Environmental Impact Statement, vol. 1, § 1.8 at 10-11 (Nov. 2012) (hereinafter "NPR-A EIS"). In addition to the National Environmental Policy Act and the laws already discussed above, the Final IAP/EIS identified: the Clean Air Act; the Clean Water Act; the Resource Conservation and Recovery Act; the Comprehensive Environmental Response, Compensation, and Liability Act; the Endangered Species Act; the Magnuson-Stevens Fishery Management and Conservation Act; the Fish and Wildlife Conservation Act of 1980; the Migratory Bird Treaty Act; the Wild and Scenic Rivers Act of 1968; the Rivers and Harbors Act of 1899; the Historic Sites Act of 1935; the National Historic Preservation Act; the Archeological Resources Protection Act; the American Indian Religious Freedom Act of 1978; the Native American Graves Protection and Repatriation Act of 1990; section 810 of the Alaska National Interest Lands Conservation Act (requiring evaluation of effect of the leasing program on subsistence uses and needs); section 302(b) of the Federal Land Policy and Management Act (requiring "action necessary to prevent unnecessary or undue degradation of the lands"); and Executive Orders 11988 (floodplain management), 11990 (wetlands protection), and 12898 (environmental justice).

⁴⁷ 40 C.F.R. § 1501.7. The regulations of the Council on Environmental Quality "are binding on all federal agencies implementing NEPA." *Wilderness Society v. Salazar*, 603 F. Supp. 2d 52, 59 (D.D.C. 2009); 40 C.F.R. § 1500.3.

⁴⁸ 40 C.F.R. § 1502.4(a).

⁴⁹ *Wyoming v. U.S. Dept. of Agriculture*, 570 F. Supp. 2d 1309, 1332 (D. Wyo. 2008) (citing 40 C.F.R. § 1508.25).

Development of a leasing program

The Notice of Intent states that the Department “intends to prepare a Leasing Environmental Impact Statement (Leasing EIS) to implement an oil and gas leasing program within the area defined as the ‘Coastal Plain.’” We agree that the Leasing EIS must encompass the entire oil and gas leasing *program*; not just the two lease sales required by section 20001(c)(1), but all connected, cumulative, and similar actions.⁵⁰

Section 20001 does not simply authorize the Secretary to conduct lease sales. It authorizes a comprehensive “oil and gas *program*.” This language mirrors the leasing provision in the Production Act, which authorized a “*program* of competitive leasing of oil and gas” in the NPR-A.⁵¹ The language in the Production Act, in turn, mirrors the language in the Outer Continental Shelf Lands Act.⁵²

Section 18 of the Outer Continental Shelf Lands Act requires the Secretary to prepare “an oil and gas leasing program,”⁵³ as the first stage in offshore oil and gas development.⁵⁴ The program requirement was intended to ensure not just “expeditious” development of the oil and gas resources of the Outer Continental Shelf, but “orderly development, subject to environmental safeguards.”⁵⁵ Section 18 requires the “leasing program” to contain “a schedule of proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity” that “will best meet national energy needs....” But it also requires that the leasing program be prepared consistent with consideration of environmental values and the potential impact of oil and gas activities on the environment.⁵⁶

⁵⁰ 40 C.F.R. § 1508.25.

⁵¹ 42 U.S.C. § 6506a(a).

⁵² The leasing authorization in the Production Act was heavily influenced by a report prepared by the Department of the Interior’s Office of Minerals Policy and Research Analysis pursuant to section 105(b) of the Production Act. It recommended that the leasing program for the NPR-A be based on the leasing program for the Outer Continental Shelf. 91 I.D. 1, 6 (1981) (Solicitor’s Opinion M-36940).

⁵³ 43 U.S.C. § 1344(a).

⁵⁴ “Since 1978 there have been four distinct statutory stages to developing an offshore oil well: (1) formulation of a ... leasing plan...; (2) lease sales; (3) exploration by the lessees; (4) development and production.” *Secretary of the Interior v. California*, 464 U.S. 312, 337 (1984).

⁵⁵ 43 U.S.C. § 1332(3).

⁵⁶ 43 U.S.C. § 1344(a)(1).

An “oil and gas program” is considerably broader than two lease sales. To “establish an administer a competitive oil and gas program for the leasing, development, production, and transportation of oil and gas” on the Coastal Plain requires a broader planning effort, directed at establishing a comprehensive program that balances oil and gas leasing with the Secretary’s broader responsibilities to protect and conserve the important surface resources and uses of the Coastal Plain.

Simply put, the requirement that “the Secretary shall manage the oil and gas program on the Coastal Plain in a manner similar to the administration of lease sales under the ... Production Act...” requires preparation of a comprehensive integrated activity plan for the Coastal Plain, “in a manner similar to” the preparation of a series of comparable integrated activity plans for the NPR-A.⁵⁷ The full range of management actions encompassed by the integrated activity plan will necessarily fall within the scope of the Leasing EIS.⁵⁸

Designation of special areas

From the beginning, a central tenet of the Production Act has been that areas within the NPR-A “containing any significant subsistence, recreational, fish and wildlife, or historical or scenic value” needed to be designated and given maximum protection.⁵⁹ The requirement that the Secretary “manage the oil and gas program on the Coastal Plain in a manner similar to the administration of lease sales under the ... Production Act” clearly requires you to designate special areas on the Coastal Plain for maximum protection before offering any areas on the Coastal Plain for lease.⁶⁰ Consideration of special area designation should clearly form part of the Integrated Activity Plan and need to be analyzed in the Leasing EIS.⁶¹

⁵⁷ E.g., NPR-A EIS in 2012. The Bureau of Land Management previously prepared integrated activity plans for the Northwest NPR-A planning area in 2004 and the Northeast NPR-A planning area in 2008.

⁵⁸ NPR-A Integrated Activity Plan, Record of Decision, 16-17 (Feb. 21, 2013) (noting that, although the Production Act exempted the NPR-A from the land use planning requirements in section 202 of the Federal Land Policy and Management Act, the integrated activity plan for the NPR-A was developed pursuant to regulations implementing NEPA).

⁵⁹ 42 U.S.C. §§ 6504(a) and 6506a(n)(2).

⁶⁰ The Utukok River Uplands, Teshekpuk Lake, and Colville River Special Areas were designated long before any lease sales were conducted in the NPR-A. 42 Fed. Reg. 28723 (June 3, 1977). In a similar manner, special areas should have been designated for the Coastal Plain before the Notice of Intent to prepare the Leasing EIS was published.

⁶¹ The NPR-A Integrated Activity Plan added 1.9 million acres to the Teshekpuk Lake Special Area and 3.1 million acres to the Utukok River Uplands Special Area and created a 107,000-acres Peard Bay Special Area to protect marine mammals and migratory birds. NPR-A Integrated Activity Plan, Record of Decision, 4 (Feb. 21, 2013).

Similarly, section 1002(d) of the Alaska National Interest Lands Conservation Act required the Secretary to close “appropriate areas” within the Coastal Plain to exploratory activities, either temporarily or permanently, “to ensure that exploratory activities do not significantly adversely affect the fish and wildlife, their habitats, or their environment.”⁶² Pursuant to this authority, the regulations governing exploratory activities on the Coastal Plain required the Fish and Wildlife Service to designate “special areas” for caribou calving, muskoxen calving, brown bear and polar bear denning, and snow goose staging, in which exploratory activities were prohibited during certain times of the year.⁶³ In addition, the Department designated the Sadlerochit Spring special area, in which exploratory activities were permanently banned.⁶⁴

Similarly, the Leasing EIS must consider the need to designate these and other special areas on the Coastal Plain to ensure the expanded oil and gas program authorized by the Tax Act does not significantly adversely affect fish and wildlife, their habitats, or the environment. Although section 1002(d) of the Alaska National Interest Lands Conservation Act may not apply to the expanded oil and gas program, the special area requirements in section 104(a) of the Production Act plainly do apply pursuant to the “in a manner similar to” requirement of section 20001(b)(3).

Adoption of rules and regulations

The Tax Act’s command that you “manage the oil and gas program on the Coastal Plain in a manner similar to the administration of” the NPR-A applies to the need for rules and regulations as well as to the designation of special areas and the scope of the Leasing EIS. The Production Act directs the Secretary to adopt rules and regulations necessary and appropriate to protect environmental, fish and wildlife, historical, and scenic values within the NPR-A,⁶⁵ and to impose “such conditions, restrictions, or prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the” Reserve.⁶⁶ The Tax Act requires the adoption of similar rules and regulations for the oil and gas program on the Coastal Plain.

⁶² 16 U.S.C. 3142 (d)(1)(B).

⁶³ 50 C.F.R. § 37.32(a)-(d). In addition, regulations gave the Fish and Wildlife Service general authority to designate special areas “that are important to other wildlife or that encompass lands” owned by Alaska Natives or the Kaktovik Inupiat Corporation. *Id.* at § 37.32(e).

⁶⁴ *Id.* at § 37.32(g).

⁶⁵ 42 U.S.C. § 6503(b).

⁶⁶ 42 U.S.C. § 6506a(b).

New rules are needed because the ones adopted for the NPR-A do not apply to the Coastal Plain by their terms,⁶⁷ and those governing oil and gas exploration on the Coastal Plain extend only to exploration activities⁶⁸ under the expired exploration program.⁶⁹ The Department will need to initiate a public rulemaking and adopt the requisite rules before any leases can be offered on the Coastal Plain. To be similar to those governing the NPR-A, the new rules must be at least as protective of the environment as those governing the NPR-A.⁷⁰ The Leasing EIS must certainly encompass the adoption of the rules and regulations that are necessary to protect the environmental values of the Coastal Plain.

Relation to the Comprehensive Conservation Plan

Section 304(g)(1) of the Alaska National Interest Lands Conservation Act requires that “[t]he Secretary shall prepare, and from time to time, revise, a comprehensive conservation plan ... for each refuge,” including the Arctic National Wildlife Refuge. The Tax Act does not waive section 304(g). It retains its full force and effect and must still be complied with.⁷¹

Section 304(g)(2) goes on to require the Secretary to identify, among other things, “the populations and habitats of the fish and wildlife resources of the refuge” and “the special values of the refuge, as well as any other archeological, cultural, ecological, geological, historical, paleontological, scenic, or wilderness value of the refuge.” Section 304(g)(3) requires each plan to “designate areas within the refuge according to the respective resources and values” and to “specify the uses within each such area which may be compatible with the major purposes of the refuge,” based on the identifications made under section 304(g)(2).

⁶⁷ 43 C.F.R. Part 3130. “These regulations establish the procedures under which the Secretary of the Interior will exercise the authority granted to administer a competitive leasing program within the National Petroleum Reserve—Alaska.” 43 C.F.R. § 3130.0-1.

⁶⁸ 50 C.F.R. Part 37.

⁶⁹ 50 C.F.R. § 37.21(b) (providing that exploration activities could continue only through May 31, 1986). See *State of Alaska v. Jewell*, 2015 U.S. Dist. LEXIS 94574 at 23 (D. Alaska 2015) (deferring to the Department’s “long-standing” and “reasonable interpretation” of section 1002(e) of the Alaska National Interest Lands Conservation Act, which “interpreted the statute to impose a temporal limit on exploration activities” through May 31, 1986).

⁷⁰ See, e.g., 43 C.F.R. § 3131.3 (requiring stipulations “for mitigating reasonably foreseeable and significant adverse impacts on surface resources”).

⁷¹ Federal agencies, like the courts, “are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is [their] duty ..., absent a clearly expressed congressional intention to the contrary, to regard each as effective. ‘When there are two acts upon the same subject, the rule is to give effect to both if possible....’” *Morton v. Mancari*, 417 U.S. 535, 549 (1974), quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). See also *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (stating that two overlapping statutes must be read “to give effect to each...”).

The Department adopted a Revised Comprehensive Conservation Plan for the Arctic National Wildlife Refuge in April 2015. By its terms, the Revised Plan was “designed to provide broad policy guidance and establishes management direction for [the] Arctic Refuge for the next 15 years.”⁷² The Record of Decision adopting the Revised Plan recommended that Congress designate the Coastal Plain as a Wilderness under the Wilderness Act and the Hulahula River, which flows through the Coastal Plain as a wild river under the Wild and Scenic Rivers Act. Pending legislative designation by Congress, the Record of Decision proposed the continued management of the Coastal Plain under Minimal Management standards.⁷³ “Minimal Management is designed to maintain Refuge environments with minimal or no evidence of human modifications or changes.” Activities are required to “minimize disturbance of habitats and resources. Ground-disturbing activities are to be avoided whenever possible.”⁷⁴

Plainly, implementation of an oil and gas program on the Coastal Plain will be inconsistent with the Minimal Management of the Coastal Plain under the current Revised Comprehensive Conservation Plan. The existing Plan cannot simply be ignored.⁷⁵ Action must be taken to revise the existing plan to reflect the enactment of the Tax Act and to harmonize, to the extent possible, the conflicting requirements of section 20001 and the Revised Comprehensive Conservation Plan for the Refuge.

Any modifications to the Revised Plan needed to accommodate the oil and gas program mandated by section 20001 should be considered and analyzed as part of the integrated activity plan for the Coastal Plain and the Leasing EIS.

Protection of Wilderness and Wild and Scenic Rivers

In particular, the integrated activity plan and the Leasing EIS should address the conflict between the wilderness and wild river designations recommended in the Revised Comprehensive Conservation Plan and the statutory mandate for an oil and gas program in section 20001. The NPR-A EIS identified lands within the Reserve possessing wilderness characteristics and considered the potential impacts that oil and gas development would have on those wilderness

⁷² Revised Comprehensive Conservation Plan, Record of Decision, at 3 (April 3, 2015).

⁷³ *Id.* at 4-5.

⁷⁴ U.S. Fish & Wildlife Service, Arctic National Wildlife Refuge Revised Comprehensive Conservation Plan/Final Environmental Impact Statement, vol. 1, at 2-35 (2015) (hereinafter Comprehensive Conservation Plan EIS).

⁷⁵ See Alaska National Interest Lands Conservation Act § 1320 (“In the absence of congressional action relating to [a Wilderness] recommendation of the Secretary, the Bureau of Land Management shall manage all such areas which are within its jurisdiction in accordance with the applicable land use plans....”).

characteristics.⁷⁶ It also considered potential wild and scenic river designations.⁷⁷ The “manner similar to” requirement in section 20001(b)(3) permits no less for the Coastal Plain.

Protection of subsistence uses

One of the principal purposes of the Alaska National Interest Lands Conservation Act was “to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.”⁷⁸ Congress devoted an entire title of the Act to protecting the subsistence way of life. In particular, section 810(a) of the Act requires the Department, in determining whether to lease or otherwise permit the use or occupancy of public lands in Alaska, to evaluate the effect of such use or occupancy on subsistence uses and needs, and determine if other lands are available for the proposed use or occupancy that might reduce or eliminate the need to use or occupy public lands needed for subsistence. Section 810(a) prohibits any lease, permit, or other use or occupancy of public lands in Alaska that “would significantly restrict subsistence uses” until the Department determines that “such a significant restriction of subsistence uses is necessary,” that it “will involve the minimal amount of land necessary,” and that “reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources....”⁷⁹ Subsection (b) further requires that these findings be included in any environmental impact statement on the proposed action. This requirement certainly applies to the Leasing EIS.

Transportation

Section 20001(b)(2)(A) acknowledges that transportation will necessarily be a major component of the oil and gas program. The Leasing EIS must thoroughly analyze the environmental impacts of transportation—not only the environmental impacts of transporting oil and gas from the Coastal Plain to market, but also the environmental impacts of transporting personnel, equipment, and supplies on the Coastal Plain in connection with exploration, leasing, development, and production activities.

⁷⁶ NPR-A Integrated Activity Plan, Record of Decision, 17 (Feb. 21, 2013). While section 107(c) of the Production Act specifically exempts the NPR-A and section 1320 of the Alaska National Interest Lands Conservation Act exempts lands in Alaska generally from the wilderness study requirements of section 603 of the Federal Land Policy and Management Act, section 1320 grants the Secretary discretionary authority to identify areas in Alaska as suitable for wilderness designation and recommend them to Congress.

⁷⁷ *Id.* at 29. Section 5(d) of the Wild and Scenic Rivers Act requires federal agencies to consider “potential wild, scenic, and recreational river areas” in all land and water use planning.

⁷⁸ 16 U.S.C. § 3101(c). Section 803 of the Act defined “subsistence uses,” in pertinent part, as “the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation....” 16 U.S.C. § 3113.

⁷⁹ 16 U.S.C. § 3120(a).

There are no roads on the Coastal Plain. Additional geological and geophysical exploration of the Coastal Plain will likely involve seismic surveys, which will require heavy vibrator equipment being driven many hundreds or even thousands of miles across the open tundra. The drilling of exploratory wells will also require the use of heavy drilling equipment, which may also be hauled cross-country or may lead to the construction of gravel or ice roads. Exploratory drilling will require construction and drilling crews. Roads and airstrips will be needed to transport workers, supplies, equipment, and construction materials to the site. Construction of roads, airstrips, drilling pads, and construction and drilling camps will require the excavation of gravel and millions of gallons of water. If oil is discovered from exploratory drilling, confirmation, delineation, and production wells will follow. More construction and drilling crews, more heavy equipment, construction materials, and supplies will need to be transported to the site. If oil and gas are produced, gathering lines and pipelines will need to be constructed, along with roads running parallel to the pipeline. Marine port facilities may be needed to sealift heavy equipment to the Coastal Plain.

In sum, an oil and gas leasing program on the Coastal Plain is likely to begin with crews and heavy equipment fanning out across the roadless tundra, followed by the construction of a large network of roads and pipelines, and a dramatic increase in air traffic of both helicopters and fixed-wing aircraft. The movement of people, equipment, and supplies across the Coastal Plain, and the construction and maintenance of the roads and pipelines needed to support an oil and gas program will have enormous environmental impacts on the Coastal Plain, which must be carefully examined in the Leasing EIS.

Section 20001(c)(2) authorizes you to issue rights-of-way across the Coastal Plain to carry out the oil and gas program. But it does not waive the requirements of title XI of the Alaska National Interest Lands Conservation Act. The Coastal Plain, as part of the Arctic National Wildlife Refuge, remains a “conservation system unit,” for purposes of title XI. Canals, ditches, flumes, laterals, pipes, and pipelines for moving water for ice roads; pipelines for moving oil and gas; communication towers; right-of-way for all-terrain vehicles; and roads, airports, landing strips, and docks all fall within the definition of “transportation or utility systems” for purposes of title XI.

Section 1107 of the Alaska National Interest Lands Conservation Act requires you to include in any right-of-way that you grant for a transportation or utility system on the Coastal Plain “requirements ... designed to control or prevent ... damage to the environment (including damage to fish and wildlife habitat),” requirements to protect individuals depending on fish and wildlife for subsistence purposes, and “requirements to employ measures to avoid or minimize adverse environmental, social or economic impacts.”⁸⁰

⁸⁰

16 U.S.C. § 3167.

Drilling pads and support facilities

In addition to roads and pipelines, the oil and gas program will necessarily involve the construction of drilling pads; sleeping accommodations for construction and drilling workers; food storage, kitchens, and eating accommodations; recreational and sanitary facilities; storage facilities for drill pipe, casing, drilling mud, cement, and other drilling supplies; power generators; communication equipment; maintenance shops and garages; and administrative offices. Reserve pits will need to be excavated adjacent to wells. Processing equipment to separate oil, gas, and water, central processing facilities, and injection wells will be needed.

Enormous amounts of gravel will need to be excavated for drill pads, support facilities, roads, and airstrips. The Department's 1987 resource assessment and legislative environmental impact statement on the Coastal Plain (hereinafter Legislative EIS) estimated that a drilling pad would require 160,000-285,000 cubic yards of gravel, an airstrip would take approximately 250,000 cubic yards, and every mile of road about 40,000 cubic yards.⁸¹

Water demand will be equally great. The Legislative EIS estimated it would take 1.7 million to 2.0 million gallons of water for drilling operations and domestic use for a single exploratory well; 1.2 million to 1.5 million gallons of water to construct and maintain a single mile of ice road; and 7 million to 8 million gallons to construct and maintain an airstrip. Added together, the Department concluded, "as much as 15 million gallons of water may be needed to drill one exploratory well."⁸² The demand for water will not slacken with development and production. The Department estimated that 30,000 gallons of water per well per day would be needed for drilling water and another 10,000 gallons per day would be needed for domestic use.⁸³

Section 20001(c)(3) permits production and support facilities to occupy no more than 2,000 surface areas of the Coastal Plain. But at the hearing before the Committee on Energy and Natural Resources on the proposed legislation on November 2, 2017, the Department's witness could not answer even the most basic questions about how 2,000-acre limitation would be implemented and enforced. Nor could he answer basic questions about the number of wells or the miles of pipeline that would be needed to support the leasing program.

⁸¹ U.S. Fish & Wildlife Service, Arctic National Wildlife Refuge, Alaska, Coastal Plain Resource Assessment, Report and Recommendation to Congress and Final Legislative Environmental Impact Statement, vol. 1, 88-89 (April 1987) (hereinafter Legislative EIS). ANILCA § 1002, 16 U.S.C. § 3142, required the Secretary to prepare a resource assessment of the Coastal Plain and to recommend to Congress whether oil and gas development should be permitted. Secretary Hodel combined the EIS on his recommendation for legislation authorizing an oil and gas program with the resource assessment.

⁸² *Id.* at 84.

⁸³ *Id.* at 88.

The Department must do better in the Leasing EIS. NEPA requires the Department to include a “detailed statement” of the anticipated environmental impacts of the oil and gas program in the Leasing EIS.⁸⁴ We recognize, of course, that this requirement “is subject to a rule of reason. The agency need not foresee the unforeseeable, but by the same token neither can it avoid” the obligation to identify foreseeable impacts “simply because describing the environmental effects ... involves some degree of forecasting. ... [T]he basic thrust of an agency’s responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA.”⁸⁵

Climate change

In addition to requiring the Department to consider the direct effects of the oil and gas program on the Coastal Plain, NEPA also requires the Department to consider the indirect effects of the program on the environment.⁸⁶ The Council on Environmental Quality’s regulations define “indirect effects” as effects that “are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”⁸⁷ The oil and gas produced on the Coastal Plain will be transported to distant markets, where it will be burned, releasing greenhouse gas emissions, and contributing to global climate change. “Climate change is a fundamental environmental issue, and its effects fall squarely within NEPA’s purview.”⁸⁸ The environmental effects of burning oil and gas from the Coastal Plain are reasonably foreseeable and must be taken into account in the Leasing EIS.⁸⁹

⁸⁴ 42 U.S.C. § 4322(C).

⁸⁵ *Scientists’ Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1092 (D. C. Cir. 1973). As Senator King told the Department’s witness at hearing before the Committee on Energy and Natural Resources on November 2, 2017, “I don’t see how you can say this looks fine unless you know how many wells, how many miles of pipeline, where they will be located. ... “[W]e’re being asked to make an assessment here of essentially economic benefit versus environmental risk, but I don’t see how you can make that evaluation without knowing the answers to those questions....” Hearing Transcript at 87.

⁸⁶ *Sierra Club v. FERC*, 867 F.3d 1357, 1371 (D.C. Cir. 2017), citing 40 C.F.R. § 1502.16.

⁸⁷ 40 C.F.R. § 1508.8(b).

⁸⁸ CEQ, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews, 2 (Aug. 1, 2016). Although CEQ has since withdrawn its guidance on “how” agencies should consider climate change in NEPA reviews, “the withdrawal of the guidance does not change any law....” 82 Fed. Reg. 16576 (April 5, 2017). NEPA still requires consideration of this “fundamental environmental issue.”

⁸⁹ See *Sierra Club v. FERC*, 867 F.3d at 1371, quoting citing *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016).

As the Department has previously acknowledged, “human activities such as the burning of fossil carbon sources have increased greenhouse gas concentrations in the atmosphere dramatically.”⁹⁰ The “existence of a causal connection between man-made greenhouse gas emissions and global warming” is no longer open to serious dispute.⁹¹ “Warming of the climate system is unequivocal...” and ‘Most of the observed increase in globally average temperatures since the mid-20th century is very likely due to the observed increases in anthropogenic (man-made) greenhouse gas concentrations.’”⁹²

The Department needs to consider not only the specific impact of the oil and gas program on the Coastal Plain on the level of the nation’s greenhouse gas emissions and global warming generally, but also how climate change generally will affect the Coastal Plain specifically. Climate change is known to impact regions differently. Temperature increases are not equally distributed. As the Department has previously acknowledged, “increases in temperature are likely to be greater at higher latitudes, such as the Arctic, where the temperature increase may be more than double the global average.”⁹³

The Department has previously cited the findings of the Arctic Climate Impact Assessment, which “reports that the extent of sea ice has been decreasing and temperature increases have ‘...increased the frequency of mild winter days, causing changes in aquatic ecosystems; the timing of river break-ups; and the frequency and severity of extreme ice jams, flood, and low flows.’” It has also cited the conclusions of the Intergovernmental Panel on Climate Change that “the combined effects of melting glaciers, melting ice caps, and sea water expansion due to warmer ocean temperatures would cause the global average sea level to rise between 0.18 to 0.51 meters (7 to 20 inches) between 1999 and the end of this century.”⁹⁴

“The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.”⁹⁵ The cumulative impact of the oil and gas program on climate change and the cumulative impact of climate change on the Coastal Plain must be thoroughly considered in the Leasing EIS.

⁹⁰ NPR-A EIS at 142.

⁹¹ *Massachusetts v. EPA*, 549 U.S. 497, 523 (2007).

⁹² NPR-A EIS at 142, quoting the Intergovernmental Panel on Climate Change.

⁹³ *Id.* at 143.

⁹⁴ *Id.*

⁹⁵ *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172, 1217 (9th Cir. 2008)

Native lands

The Notice of Intent states that the Leasing EIS “will consider all Federal lands and waters within the area defined by Congress as the Coastal Plain.” Section 20001(a)(1) defines the term “Coastal Plain” to mean the 1002 Area depicted on two referenced maps. The two maps exclude from the 1002 Area three townships (69,120 acres) of land selected by the Kaktovik Inupiat Corporation pursuant to the Alaska Native Claims Settlement Act. In addition, the Kaktovik Inupiat Corporation was permitted to acquire an additional township (23,040 acres) of land within the 1002 pursuant to section 1431(a) of the Alaska National Interest Lands Conservation Act. The Arctic Slope Regional Corporation subsequently acquired the surface estate beneath the Kaktovik Inupiat Corporation’s lands, both the township within the 1002 Area and the three townships outside the 1002 Area, pursuant to the so-called Chandler Lake Agreement signed by Secretary Watt in August 1983.⁹⁶

As a result, the mineral estate beneath more than 92,000 acres of land within the Arctic National Wildlife Refuge is owned by Arctic Slope Regional Corporation rather than the Federal Government. A quarter of this land is within the 1002 Area and thus within the “Coastal Plain” as that term is defined by section 20001(a)(1). Until recently, leasing and production of oil and gas were prohibited on these Native lands, as within the rest of the Refuge, both by section 1003 of the Alaska National Interest Lands Conservation Act,⁹⁷ and by the Chandler Lake Agreement.⁹⁸ By making section 1003 inapplicable to the Coastal Plain and authorizing an oil and gas program on the Coastal Plain, section 20001 appears to permit production of oil and gas on the Arctic Slope Regional Corporation’s lands, at least its lands within the 1002 Area, if not all of its lands within the Refuge.

NEPA does not allow the Department to restrict the Leasing EIS to “Federal lands,” as the Notice of Intent proposes. The courts have repeatedly held that “An agency is required to consider more than one action in a single EIS if they are ‘connected actions,’ ‘cumulative actions,’ or ‘similar actions.’”⁹⁹

⁹⁶ Agreement Between Arctic Slope Regional Corporation and the United States of America, ¶ 3 (Aug. 9, 1983) (hereinafter the “Chandler Lake Agreement”).

⁹⁷ 16 U.S.C. § 3143.

⁹⁸ Chandler Lake Agreement, appendix 2, part B, ¶ 2 (“Production of oil and gas from ASRC Lands is prohibited and no leasing or other development leading to production of oil and gas from ASRC Lands shall be undertaken until Congress authorizes such activities on Refuge lands within the coastal plain or on ASRC Lands, or both.”). Paragraph 4 of the Chandler Lake Agreement incorporated as part of the agreement “the stipulations and limitations on ASRC’s activities and uses set forth in Appendix 2....”

⁹⁹ *Northwest Resource Information Center v. National Marine Fisheries Service*, 56 F.3d 1060, 1067 (9th Cir. 1995).

Oil and gas development on the Arctic Slope Regional Corporation's lands is clearly "connected" to the oil and gas program on the Federal land on the Coastal Plain. The Council on Environmental Quality defines "connected actions," in pertinent part, to mean actions that "are closely related." Actions are connected if one "[c]annot or will not proceed unless [the] other actions are taken previously or simultaneously."¹⁰⁰ Plainly, production of oil and gas from the Arctic Slope Regional Corporation's lands is expressly tied to production of oil and gas from the Federal lands on the Coastal Plain by the Chandler Lake Agreement. Production of oil and gas from the Corporation's lands is only possible because Congress has authorized the oil and gas program on the Federal lands on the Coastal Plain.

Similarly, "NEPA requires that where several actions have a cumulative or synergistic environmental effect, this consequence must be considered in [a single] EIS."¹⁰¹ The Council on Environmental Quality defines "cumulative impact" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."¹⁰² Oil and gas production on the Arctic Slope Regional Corporation's lands on the Coastal Plain is reasonably foreseeable in light of the authorization of the oil and gas program on the Federal lands on the Coastal Plain. The environmental impacts of oil and gas production on Native lands and on Federal lands on the Coastal Plain will plainly be cumulative. "[W]here several foreseeable projects in a geographical region have a cumulative impact, they should be evaluated in a single EIS."¹⁰³

¹⁰⁰ 40 C.F.R. § 1508.25(a)(1)(i). "The Ninth Circuit applies an 'independent utility' test to determine whether actions are 'connected' for purposes of NEPA review." *Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1305 (9th Cir. 2003), citing *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 894 (9th Cir. 2002) ("Where each of two projects would have taken place with or without the other, each has 'independent utility' and the two are not considered connected actions."). Under this test, oil and gas production on the Native lands is plainly connected to oil and gas production on the Federal lands since, under the Chandler Lake Agreement, oil and gas production on the Native lands would still be prohibited but for authorization of the oil and gas program on the Federal lands on the Coastal Plain.

¹⁰¹ *Sierra Club v. Penfold*, 857 F.2d 1307, 1320-1321 (9th Cir. 1988), citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976).

¹⁰² 40 C.F.R. § 1508.7. CEQ also defines "cumulative actions" as actions that "have cumulatively significant impacts and should therefore be discussed in the same impact statement." *Id.* § 1508.25(a)(2).

¹⁰³ *Tenakee Springs v. Clough*, 915 F.2d 1308 (9th Cir. 1990), citing *LaFlamme v. Federal Energy Regulatory Commission*, 852 F.2d 389, 401-402 (9th Cir. 1988).

Finally, oil and gas production on the Native lands is a “similar action” to oil and gas production on the Federal lands on the Coastal Plain. “Similar actions are defined as actions ‘which when viewed with other reasonably foreseeable or proposed agency action, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography.’”¹⁰⁴ Again, oil and gas production on the Arctic Slope Regional Corporation’s lands on the Coastal Plain are both reasonably foreseeable and share a common geography with oil and gas production on adjacent Federal lands on the Coastal Plain. Both need to be addressed in the Leasing EIS.¹⁰⁵

Alternatives

Even though section 20001 mandates an oil and gas leasing program on the Coastal Plain, NEPA still requires the Department to consider alternative approaches to fulfilling that mandate in the Leasing EIS. It is not enough for the Leasing EIS to present a single course of action. NEPA requires an environmental impact statement to describe and analyze “alternatives to the proposed action.”¹⁰⁶ Consideration of alternatives is often called “the heart of the environmental impact statement.”¹⁰⁷ Alternatives are necessary to provide “a clear basis for choice among options by the decisionmaker and the public.”¹⁰⁸ Consideration of alternatives is necessary to ensure that the Department “has before it and ‘takes into proper account all possible approaches to a particular project ... which would alter the environmental impact....’”¹⁰⁹

¹⁰⁴ *Sierra Club v. Bosworth*, 199 F. Supp. 2d 971, 990 (N.D. Cal. 2002), quoting 40 C.F.R. § 1508.25(a)(3).

¹⁰⁵ *Sierra Club v. Bosworth*, 199 F. Supp. 2d at 990 (“similar actions must be addressed within a single EIS”), citing *Northwest Resource Information Center v. National Marine Fisheries Service*, 56 F.3d 1060, 1067 (9th Cir. 1995).

¹⁰⁶ 42 U.S.C. § 4332(2)(C)(iii).

¹⁰⁷ *E.g., Northern Alaska Environmental Center v. Norton*, 361 F. Supp. 2d 1069, 1074 (D. Alaska 2005), quoting 40 C.F.R. § 1502.14. One of the principal purposes of an environmental impact statement is to “inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1.

¹⁰⁸ 40 C.F.R. § 1502.14. An EIS serves two important purposes. “It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

¹⁰⁹ *Northern Alaska Environmental Center v. Norton*, 361 F. Supp. 2d at 1074-1075, quoting *Calvert Cliffs’ Coordinating Committee, Inc. v. U.S. Atomic Energy Commission*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

To this end, the Leasing EIS must “[r]igorously explore and objectively evaluate all reasonable alternatives” to the proposed action.¹¹⁰ The requirement to consider alternatives applies to the Leasing EIS, even though Congress has already mandated that you establish an oil and gas leasing program. Within the broad statutory parameters of at least two lease sales, each offering at least 400,000 acres, within the next 10 years, the Department has discretion to shape the oil and gas program, and NEPA requires you to consider a range of alternative ways of meeting the statutory directive. Although Congress “did not give the Secretary the discretion not to lease” the Coastal Plain, it did give you “the discretion to provide rules and regulations under which leasing would be conducted and ... to develop restrictions necessary to mitigate adverse impact on the” Coastal Plain.¹¹¹ Such restrictions must be considered in the Leasing EIS.

The Leasing EIS must include consideration of not only a range of reasonable alternatives but also “the alternative of no action.”¹¹² The “no action alternative must be considered in every EIS,”¹¹³ even though inaction does not meet the statutory mandate.¹¹⁴ The “no action” alternative must be considered because it “allows policymakers and the public to compare the environmental consequences of the status quo to the consequences of the proposed action. The no action alternative is meant to ‘provide a baseline against which the action alternative[s] are] evaluated.’”¹¹⁵ Thus, the fact that section 20001 of the Tax Act mandates an oil and gas program does not relieve the Department of its obligation to consider a “no action” alternative in the Leasing EIS.

¹¹⁰ 40 C.F.R. § 1502.14(a). “The agency must look at every reasonable alternative within the range dictated by the nature and scope of the proposal.” *Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998).

¹¹¹ *Kunaknana v. Clark*, 742 F.2d 1145, 1149 (9th Cir. 1984) (describing the Production Act).

¹¹² See *Center for Biological Diversity v. Bureau of Land Management*, 746 F. Supp. 2d 1055, 1090 (N.D. Cal. 2009), citing 42 U.S.C. § 4332(C) and 40 C.F.R. § 1502.14(a), (d).

¹¹³ *Center for Biological Diversity v. Department of the Interior*, 623 F.3d at 642, citing 40 C.F.R. § 1502.14(d).

¹¹⁴ Council on Environmental Quality “regulations require the analysis of the no action alternative even if the agency is under a court order or legislative command to act. This analysis provides a benchmark, enabling decisionmakers to compare the magnitude of environmental effects of the action alternatives. ... Inclusion of such an analysis in the EIS is necessary to inform the Congress, the public, and the President as intended by NEPA.” CEQ, Forty Most Asked Questions Concerning CEQ’s NEPA Regulations, Question 3, 46 Fed. Reg. 18016, 18927 (1981).

¹¹⁵ *Id.*, quoting *Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998).

The Legislative EIS identified and evaluated five alternatives, including full leasing of the 1002 Area; limited leasing of the 1002 Area, which would not allow leasing in concentrated caribou calving areas; further exploration to collect more data before authorizing leasing; no action (continued management under the Refuge's comprehensive conservation plan); and designation of the 1002 area as wilderness.¹¹⁶

The NPR-A EIS identified and evaluated five alternatives, including a no-action alternative; leasing of nearly half of the Reserve while substantially enlarging the special areas and recommending designation of 12 Wild and Scenic Rivers; leasing of slightly more than half the Reserve and allowing pipeline construction in special areas; leasing in more than three-quarters of the Reserve; and offering the entire Reserve for leasing, while still protecting surface values.¹¹⁷ Importantly, each of the alternatives, proposed various measures to protect surface resources, which included designating new or expanding existing special areas, recommending congressional designation of Wild and Scenic Rivers, and imposing lease stipulations and requiring certain operating procedures and best management practices.

The Leasing EIS should do no less. It should identify and evaluate a range of leasing options that meet the statutory mandate for a leasing program. At the same time, the Leasing EIS should propose measures to protect surface values by designating special areas, prohibiting exploration, leasing, development, and production in certain areas or in certain times of the year, and imposing protective lease stipulations, operating procedures, and best management practices.

"The goal of [NEPA] is to ensure 'that federal agencies infuse in project planning a thorough consideration of environmental values.'"¹¹⁸ Consideration of alternatives furthers that goal by requiring the Department to look at all reasonable approaches to the leasing program. The Leasing EIS can only meet NEPA's goal of infusing consideration of environmental values in the oil and gas program if it is written to "inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment."¹¹⁹

¹¹⁶ Legislative EIS at 97-104.

¹¹⁷ NPR-A EIS at 15.

¹¹⁸ *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988), quoting *Conner v. Burford*, 836 F.2d 1521, 1532 (9th Cir. 1988).

¹¹⁹ 40 C.F.R. § 1502.1.

Environmental consequences

The Leasing EIS must “provide full and fair discussion of significant environmental impacts” of an oil and gas program on the Coastal Plain.¹²⁰ “The heart of every environmental impact statement is its examination of the environmental consequences of the proposed agency action.”¹²¹ The discussion of environmental consequences “forms the scientific and analytic basis for the comparisons” of alternatives.¹²²

As already discussed, the Leasing EIS must encompass the full scope of the oil and gas program, including all of the exploration, leasing, development, production, and transportation activities that will make up the oil and gas program. We recognize that the exact number and location of the drilling pads, roads, and pipelines are still unknown at this stage. Plainly, “until the lessees do exploratory work, the government cannot know what sites will be deemed most suitable for exploratory drilling, much less for development.”¹²³ “Without site-specific information, precise effects cannot be predicted.”¹²⁴ But the function of a programmatic environmental impact statement is to examine “the broad environmental consequences attendant upon a wide-ranging federal program,”¹²⁵ “before the action is taken and those effects are fully known.”¹²⁶ The magnitude and types of environmental consequences that will result from oil and gas exploration, development, production, and transportation in the Arctic is reasonably foreseeable and must be identified and examined in the Leasing EIS.¹²⁷

¹²⁰ 40 C.F.R. § 1502.1.

¹²¹ *Izaak Walton League v. Marsh*, 655 F.2d 346, 375 (D.C. Cir. 1981).

¹²² 40 C.F.R. § 1502.16.

¹²³ *Northern Alaska Environmental Center v. Kempthorne*, 457 F.3d 969, 976 (9th Cir. 2006).

¹²⁴ Legislative EIS at 105.

¹²⁵ *National Wildlife Federation v. Appalachian Regional Commission*, 677 F.2d 883, 888 (D.C. Cir. 1981). *See also Northern Alaska Environmental Center v. Lujan*, 961 F.2d 886 (9th Cir. 1992) (stating that “site-specific impacts need not be fully evaluated” in a programmatic EIS).

¹²⁶ *Scientists’ Institute for Public Information v. Atomic Energy Commission*, 481 F.2d 1079, 1092 (D.C. Cir. 1973) (“Reasonable forecasting and speculation is thus implicit in NEPA”).

¹²⁷ The “environmental effects [will necessarily] be reassessed at all appropriate stages for each subsequent lease sale and all development stages, as the required authorizations are obtained.” Legislative EIS at 105. *See also Northern Alaska Environmental Center v. Kempthorne*, 457 F.3d at 977 (“NEPA applies at all stages of the process...”).

As the Department's Legislative EIS found, geological and geophysical exploration, exploratory drilling, and the construction and operation of facilities needed to develop and produce oil and gas, including the roads needed to transport workers, equipment, and supplies, and the pipelines needed to transport any oil and gas that is produced will all impact the Coastal Plain. These impacts will include:

- Noise generated by helicopters transporting survey teams to and from survey sites.
- Scarring of tundra as a result of the overland movement of seismic testing vehicles, causing thawing of the permafrost, ponding, erosion, and silting of streams.
- Destruction of vegetation needed by wildlife for food and cover as a result of the construction of drill pads, reserve pits, support facilities, roads, and airstrips needed for exploratory wells, and later, development and production wells.
- Depletion of limited water resources for drilling, ice roads, and domestic use.
- Permanent alteration of the tundra and streambeds resulting from the construction of reservoirs and the excavation of gravel for roads, drill pads, and support facilities.
- Construction of gathering lines, pump stations, central production facilities, and pipelines.
- Disposal of solid wastes, using incinerators, landfills, and oil-waste pits.
- Air emissions generated by exploration, drilling, construction, excavation, vehicles, helicopters, airplanes, pipelines, electric generators, oil and gas production, and gas flaring.¹²⁸

The effect of all of these on fish and wildlife, their habitats, and on the Alaska Natives who rely on them for subsistence must be fully identified and examined in the Leasing EIS.

Polar bears. Particular attention must be paid to the effects of the oil and gas program on polar bears in the Leasing EIS, as it was in the Legislative EIS in 1987. The Legislative EIS found that "Polar bears are particularly sensitive to human activities during the denning period. ... [F]emales will usually abandon their dens prematurely if disturbed. Early den abandonment can be fatal to cubs unable to fend for themselves or travel with their mother."

"Pipelines and roadways may prevent female polar bears from moving to and from inland denning areas. ... Disturbance by oil exploration, construction, and production in the immediate vicinity of polar bear dens could cause the bears to abandon dens. Production activities could create disturbances that would likely keep bears from returning to those preferred denning areas."¹²⁹

¹²⁸ See generally Legislative EIS at 105-113.

¹²⁹ *Id.* at 129.

“Development and production facilities in confirmed coastal denning areas could produce a major reduction in the availability of denning habitat.”¹³⁰

The need for careful examination of the environmental effects of the oil and gas program on polar bears is even greater now than it was when the Legislative EIS was prepared in 1987. Since then the polar bear has been listed as threatened on the Endangered Species List,¹³¹ and much of the Coastal Plain has been designated as critical habitat for the polar bear.¹³²

Caribou. Special attention should also be paid to the effects of the oil and gas program on caribou in the Leasing EIS, as it was in the Legislative EIS.¹³³ The Legislative EIS found that “direct habitat modification, displacement, obstructions to movements, which could reduce access to important habitats, and disturbance or harassment” of caribou would result from development, production, and transportation of oil and gas on the Coastal Plain.¹³⁴

The Legislative EIS also found that displacement and disturbance of the Porcupine and Central Arctic caribou herds are “unavoidable if oil development occurs on the 1002 area. It can result from a variety of causes—presence of pipelines and roads, aircraft operations, general construction, routine field operations, and the presence of humans.”¹³⁵

Birds. Special attention must also be given to the effects of the oil and gas program on migratory birds. The Coastal Plain is vitally important as a breeding ground for migratory birds. The Legislative EIS reported 135 species of birds as having been recorded on the Coastal Plain.¹³⁶ Most are migratory, present on the Coastal Plain during the summer breeding season from May to September, and flying south for the winter, to all 50 states and 6 of the 7 continents.

¹³⁰ *Id.* at 129.

¹³¹ 73 Fed. Reg. 28212 (May 15, 2008) (determination of threatened status of the polar bear); 73 Fed. Reg. 28306 (May 15, 2008) (special rule for conservation of the polar bear).

¹³² 75 Fed. Reg. 76086 (Dec. 7, 2010) (designation of critical habitat for the polar bear).

¹³³ Legislative EIS at 106 (“Given the strong public interest and extensive interactions likely from oil development on the 1002 area for this species, the report includes a particularly detailed assessment of caribou.”).

¹³⁴ *Id.* at 118.

¹³⁵ *Id.* at 119. “Disturbance is generally believed to result more from human activity (noise, traffic, presence of people) than from the mere physical presence of the roads, pipelines, and buildings.” *Id.*

¹³⁶ *Id.* at 31. The Comprehensive Conservation Plan for the Refuge states that 201 species of birds have been recorded on the Refuge as a whole, 109 of which have been confirmed as breeding in the Refuge and another 35 likely to breed there, though breeding has not been confirmed. Comprehensive Conservation Plan EIS, vol. 1, at 4-78 (2015).

The Legislative EIS reported that oil and gas development on the Coastal Plain may affect migratory birds in multiple ways. Road, pipeline, and facility construction, gravel mining, and dredge-and-fill operations will permanently alter or destroy nesting and feeding habitat. Air and road traffic and other human activity, especially near nesting waterfowl, may cause abandonment of important nesting, feeding, and staging areas. Oil spills and contaminants from reserve pits and drilling muds and fluids may kill birds through ingestion, contact, destruction of eggs, and destruction of food sources.¹³⁷

Subsistence. In addition, the Leasing EIS must give special attention to the effect of the oil and gas program on subsistence resources, particularly on caribou, but also on fish and wildlife resources broadly. The Legislative EIS reported that “[r]eductions in fish and wildlife populations, displacement of fish and wildlife from areas of traditional harvest, and reduced access to those resources will adversely affect subsistence uses.”¹³⁸

Finally, we must emphasize that NEPA requires “a detailed statement” of the environmental impacts of the oil and gas program on the Coastal Plain,¹³⁹ notwithstanding the arbitrary page limits and deadlines called for by Secretarial Order 3355 last August.¹⁴⁰ While it is certainly true that “NEPA’s purpose is not to generate paperwork”¹⁴¹ or “amassing needless detail,”¹⁴² NEPA requires “that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.”¹⁴³ And while “NEPA does not mandate the inclusion in an EIS ... of every piece of information known to the agency,”¹⁴⁴ it requires “that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of the decision.”¹⁴⁵ NEPA’s statutory mandates must take priority over arbitrary page limits that would inappropriately limit consideration of the environmental consequences of the program.

¹³⁷ Legislative EIS at 131-132.

¹³⁸ *Id.* at 139.

¹³⁹ 42 U.S.C. § 4332(2)(C).

¹⁴⁰ Streamlining NEPA Reviews and Implementation of Executive Order 13807 (Aug. 31, 2017) (stating that an EIS “shall not be more than 150 pages or 300 pages for unusually complex projects”).

¹⁴¹ 40 C.F.R. § 1500.1(c).

¹⁴² 40 C.F.R. § 1500.1(b).

¹⁴³ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

¹⁴⁴ *Humane Society of the United States v. Watt*, 551 F. Supp. 1310, 1321 (D.D.C. 1982).

¹⁴⁵ *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 349.

We note in this regard that the NPR-A EIS devoted three volumes, spanning nearly 1,200 pages to the environmental consequences of the oil and gas program for the NPR-A. The Tax Act's "in a manner similar to" requirement requires an equally full and detailed statement of the environmental consequences of the oil and gas program in the Arctic Refuge.

Mitigation

Another "important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences."¹⁴⁶ As defined by the Council on Environmental Quality (CEQ), "mitigation" consists of five elements—avoiding, minimizing, rectifying, reducing or eliminating, and compensating for adverse impacts.¹⁴⁷

"The requirement that an EIS contain a detailed discussion of possible mitigation measures flows both from the language of the Act and, more expressly from CEQ's implementing regulations. Implicit in NEPA's demand that an agency prepare a detailed statement on 'any adverse environmental effects which cannot be avoided should the proposal be implemented,' ... is an understanding that the EIS will discuss the extent to which adverse effects can be avoided."¹⁴⁸ "Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects."¹⁴⁹

"Recognizing the importance of such a discussion in guaranteeing that the agency has taken a 'hard look' at the environmental consequences of proposed federal action, CEQ regulations require that the agency discuss possible mitigation measures in defining the scope of the EIS, in discussing alternatives to the proposed action, and consequences of that action, and in explaining its ultimate decision."¹⁵⁰

¹⁴⁶ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

¹⁴⁷ 40 C.F.R. § 1508.20 ("Mitigation includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.)

¹⁴⁸ 490 U.S. at 351-352, quoting 42 U.S.C. § 4332(2)(C)(ii).

¹⁴⁹ *Id.* at 352.

¹⁵⁰ *Id.*, citing 40 C.F.R. §§ 1508.25(b) (scope of the EIS), 1502.14(f) (alternatives), 1502.16(h) (environmental consequences), 1505.2(c) (record of decision).

In addition to NEPA's procedural requirement "that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated,"¹⁵¹ the Production Act substantively requires that oil and gas activities in the NPR-A "shall include or provide for such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources...."¹⁵² Once again, by requiring that "the Secretary ... manage the oil and gas program on the Coastal Plain in a manner similar to the administration of" the Production Act, Congress has applied the Production Act's mitigation requirement to the Coastal Plain.

Accordingly, the Leasing EIS must contain a discussion of the restrictions on exploration, leasing, development, and production activities and associated infrastructure construction that will be implemented to avoid or mitigate environmental harm. These measures should include rules and regulations adopted by the Department for the protection of surface resources and environmental values of the Refuge; the designation of special areas in which exploration and leasing are restricted or prohibited; lease terms, conditions, and stipulations; best management practices that require that certain protections be achieved; and other measures designed to reduce or prevent environmental harm.¹⁵³

Conclusion

Section 20001 of the Tax Act is not Congress's first word on the Coastal Plain, nor is it likely to be its last. The question of whether to permit oil and gas development on the Coastal Plain has divided Congress for sixty years.¹⁵⁴ Even the Alaska National Interest Lands Conservation Act did not resolve the issue. Instead, the Act called for more information on the Coastal Plain's fish and wildlife resources and on the impact oil and gas development would have on them and prohibited any leasing or development until authorized by Congress. The Senate Committee report on the bill stated that "the Committee was determined that a decision" on oil and gas development on the Coastal Plain would "be made only with adequate information and the full participation of the Congress."¹⁵⁵

¹⁵¹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 352.

¹⁵² 42 U.S.C. § 6506a(b).

¹⁵³ *See, e.g.*, NPR-A Integrated Activity Plan Record of Decision, app. A, Lease Stipulations and Best Management Practices (Feb. 2013).

¹⁵⁴ Secretary Seaton first proposed legislation to establish an Arctic Wildlife Range encompassing the Coastal Plain, to preserve "wildlife and wilderness values," but still permit oil and gas leasing, in April 1959. The House passed the bill (H.R. 7045) in February 1960. The Senate took no action on it or the Senate companion measure, S. 1899. *See* H. Rept. 86-771 (1959).

¹⁵⁵ S. Rept. 96-413 at 241 (1979).

Section 20001 of the Tax Act lifted the prohibition on leasing, but it did nothing to settle the long-standing dispute between wilderness preservation and oil and gas development. The Tax Act was enacted under the restrictive procedures governing budget reconciliation legislation, which do not afford Senators the opportunity of full debate and amendment that is needed to forge consensus and compromise. Senate rules that prohibit “extraneous” provisions that do not have budget impacts from being included in budget reconciliation legislation prevented Congress from fully addressing important aspects of the issue.¹⁵⁶

As a result, the prohibition on leasing has been lifted and you now have statutory authority to proceed with a leasing program, but the laws governing how you conduct the program are found not in the Tax Act, but in the Production Act, the Refuge Administration Act, the Alaska National Interest Lands Conservation Act, and a web of other environmental laws. This makes preparation of the Leasing EIS especially challenging and especially important. The Leasing EIS will, as we have discussed, require consideration of the environmental impacts of a broad program of exploration, leasing, development, production, and transportation of oil and gas on the Coastal Plain. It will need to encompass the adoption of rules and regulations needed to protect the fish and wildlife, subsistence, recreational, historical, and scenic values of the Coastal Plain. It will need to encompass the designation of special areas in which oil and gas activities are restricted or prohibited to protect these values. It will need to reconcile the establishment of the oil and gas program with the existing Comprehensive Conservation Plan that now governs the Arctic National Wildlife Refuge. It will need to show how oil and gas development can be conducted in a manner that is compatible with the fish and wildlife purposes for which the Arctic Refuge was established. It will need to encompass connected, cumulative, and similar oil and gas activities on Native Alaska lands on the Coastal Plain. It will need to consider effects on fish and wildlife, their habitats, and the subsistence needs of Alaska Natives. And it will need to discuss how environmental harms can be avoided or mitigated.

The Tax Act gives you authority to permit oil and gas development on the Coastal Plain. But it does not give you authority to permit harm to the fish and wildlife the Arctic Refuge was established to protect, their habitats, or the people who depend on them for subsistence. The Leasing EIS gives you the opportunity to show how oil and gas can be produced on the Coastal Plain without significant harm to the environment, if, indeed, that is possible.

Sincerely,



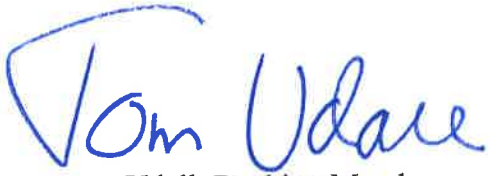
Maria Cantwell, Ranking Member
Committee on Energy & Natural Resources



Thomas R. Carper, Ranking Member
Committee on Environment & Public Works

¹⁵⁶

See 2 U.S.C. § 644 (extraneous matter in reconciliation legislation).

A handwritten signature in blue ink that reads "Tom Udall". The signature is fluid and cursive, with the first name "Tom" being more prominent than the last name "Udall".

Tom Udall, Ranking Member
Subcommittee on Interior, Environment,
and Related Agencies
Committee on Appropriations

A handwritten signature in blue ink that reads "Michael F. Bennet". The signature is written in a cursive style, with the first name "Michael" and the last name "Bennet" being clearly legible.

Michael F. Bennet
United States Senator

A handwritten signature in blue ink that reads "Edward J. Markey". The signature is written in a cursive style, with the first name "Edward" and the last name "Markey" being clearly legible.

Edward J. Markey
United States Senator